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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship and Immigration Services

PUBLIC COPY



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FILE: [Redacted] Office: VERMONT SERVICE CENTER  
EAC 02 111 53845

Date: JUL 20 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the AAO on a motion to reconsider. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The petitioner is an automobile body repair and paint shop. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a custom painter. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage beginning on the priority date priority date of the visa petition, and denied the petition accordingly. The AAO affirmed that decision, dismissing the appeal. In support of the motion, counsel submits a letter.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

*Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [Citizenship and Immigration Service (CIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant motion qualifies as a motion to reconsider because counsel is asserting that the decision dismissing the appeal was incorrect based on the evidence then in the record.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are unavailable in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted on January 12, 1998. The proffered wage as stated on the Form ETA 750 is \$20.71 per hour, which equals \$43,076.80 per year.

On the petition, the petitioner stated that it was established during 1998 and that it employs six workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in New York, New York.

The petitioner, as identified on the Form I-140 petition, is New York SUV Corporation. The petition adds, parenthetically, that the petitioner was formerly known as Midtown Classic Automotive Corporation. The employer named on the Form ETA 750 was originally Midtown Classic Automotive Corporation of 529 W 35<sup>th</sup> Street in New York. At some point, either before or after approval, the Form ETA 750 was amended to indicate that the prospective employer is New York SUV Corporation of 547 West 28<sup>th</sup> Street.<sup>1</sup>

With the petition counsel submitted a copy of the 1998 Form 1120S, U.S. Income Tax Return for an S Corporation of Midtown Classic Automotive Corporation. That return shows that Midtown Classic reported taxes pursuant to the calendar year. The 1998 return shows that during that year Midtown Classic reported ordinary income of \$29,735. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel also submitted a letter, dated February 4, 2002. In that letter counsel stated that the petitioner changed its name and address during the pendency of the petition, and that "The above issue was addressed and resolved at the NYS Dept. of Labor level and at the U.S. Dept. of Labor in New York City as noted on its certification document. herewith [sic] attached."

In fact, nothing on the Form ETA 750 indicates that the Department of Labor was made aware of the change in name and change of address. As was noted above, the original name and address on the Form ETA 750 were stricken out and replaced, but the form does not indicate that the name "New York SUV" appeared on the Form ETA 750 when it was approved.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on March 21, 2002, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center also specifically requested that, if the petitioner employed the beneficiary during 1998, it provide a copy of the Form W-2 Wage and Tax Statement showing the wages it paid to the beneficiary during that year.

In response, counsel submitted no W-2 forms. Counsel submitted copies of portions of the beneficiary's 1999, 2000, and 2001 Form 1120S, U.S. Income Tax Returns for an S Corporation. Those partial returns show that the petitioner reports taxes based on the calendar year.

The 1999 return, which indicates that it is the petitioner's initial return, covers the period from April 12, 1999 to the end of the year, apparently indicating that on that date the petitioner either was incorporated or began operations. During that portion of 1999 the petitioner declared a loss of \$3,296 as its ordinary income.

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<sup>1</sup> The form was stamped to indicate that a change to the petitioner's name was approved by the Department of Labor. However, the amended name seems to have been changed a second time, possibly after approval of the Form ETA 750.

Because counsel did not provide the corresponding Schedule L, this office is unable to calculate the petitioner's 1999 year-end net current assets.

The 2000 return shows that the petitioner declared ordinary income of \$29,681 during that year. Because counsel did not provide the corresponding Schedule L, this office is unable to calculate the petitioner's 2000 year-end net current assets.

The 2001 return shows that the petitioner declared ordinary income of \$20,464 during that year. Because counsel did not provide the corresponding Schedule L, this office is unable to calculate the petitioner's 2001 year-end net current assets.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on September 6, 2002, denied the petition.

On appeal, counsel submitted an additional copy of the 1998 return of Midtown Classic Automotive Corporation and additional copies of the previously submitted portions of the petitioner's 1999, 2000, and 2001 tax returns. Again, the 1999, 2000, and 2001 Schedules L were not submitted.

Counsel also submitted a letter from the petitioner's president, dated October 3, 2002. That letter states that the amount shown on its Schedules A as Other Costs includes some amounts paid to contractors to perform work that, given the appropriate equipment, the beneficiary could perform for less cost. The petitioner's president stated that the amounts paid to contractors would more than cover the proffered wage, but provided no documentary evidence in support of that assertion.<sup>2</sup>

The Director, AAO found that the petitioner had not demonstrated the continuing ability to pay the proffered wage beginning on the priority date and dismissed the appeal on October 2, 2003.

On the motion, counsel submits a letter, dated October 30, 2003. In that letter counsel states that the petitioner's ordinary income during a given year may be a poor index of its ability to pay additional wages. Counsel also argues that the amounts expended on contract labor had not been correctly considered in the determination of the petitioner's ability to pay additional wages, but did not state the amounts of those contract labor expenses.

Counsel's assertion that a tax return is an inaccurate indicator of a petitioner's cash position is inapposite. That assertion neither demonstrates the petitioner's ability to pay the proffered wage nor excuses the petitioner's obligation, pursuant to 8 C.F.R. § 204.5(g)(2), to show that ability. Pursuant to that regulation, the petitioner was obliged to choose between copies of annual reports, federal tax returns, and audited financial statements to show its continuing ability to pay the proffered wage beginning on the priority date. The petitioner submitted neither audited financial statements nor annual reports. The petitioner chose to show its ability to pay the proffered wage with its tax returns. If the tax returns fail to show that ability, arguing that they are poor barometers will not suffice.

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<sup>2</sup> This office notes that, on the 1998 Schedule A, Other Costs amounted to \$13,776, and that, even if that entire amount were available to pay the proffered wage, it would be insufficient.

Counsel and the petitioner have asserted that the petitioner's Other Costs shown on its Schedules A include payments made to contractors to perform the duties of the proffered position, but provided no evidence of that assertion. Merely going on record without evidence is insufficient to sustain the burden of proof. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Neither counsel nor the petitioner, however, has ever demonstrated, or even alleged, what portion of its Other Costs was paid to contractors for performing the duties of the proffered position, as opposed to the amount of its Other Costs that was paid toward other expenses.<sup>3</sup> The petitioner has not demonstrated what portion, if any, of its Other Costs should be included in the determination of its ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The priority date is January 12, 1998. The proffered wage is \$43,076.80 per year.

During 1998 Midtown Classic reported ordinary income of \$29,735. That amount is insufficient to pay the proffered wage. At the end of that year Midtown Classic had negative net current assets. Midtown Classic is unable to show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has provided no evidence of any other funds available to Midtown Classic during that

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<sup>3</sup> The petitioner's president did allege, in the letter of October 3, 2002, that the amount paid to contractors during the salient years, and included in Other Costs, exceeded the amount of the proffered wage. As was noted in a previous footnote, however, this is demonstrably untrue, as the entire amount of the petitioner's 1998 Other Costs was insufficient to pay the proffered wage.

year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999 the petitioner declared a loss of \$3,296. The petitioner is unable to show the ability to pay any portion of the proffered wage during that year out of its ordinary income. Counsel provided no evidence from which the petitioner's net current assets could be calculated. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage out of its year-end net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during 1999. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner declared ordinary income of \$29,681. That amount is insufficient to pay the proffered wage. Counsel provided no evidence from which the petitioner's net current assets could be calculated. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage out of its year-end net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during 2000. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner declared ordinary income of \$20,464. That amount is insufficient to pay the proffered wage. Counsel provided no evidence from which the petitioner's net current assets could be calculated. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage out of its year-end net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during 2001. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2001.

The documentation submitted does not establish that the petitioner had sufficient available funds to pay the salary offered during 1998, 1999, 2000, or 2001. Therefore, the objection of the AAO has not been overcome on the motion.

The record raises another issue that has never previously been addressed.<sup>4</sup> The approved Form ETA 750 was filed by Midtown Classic Automotive Corporation (EID 13-3796944). The petition in this case, however, was filed by New York SUV Corporation (EID 13-4057150). Those companies reported different addresses and are apparently different companies. Counsel states that the issue pertinent to that difference was addressed by the Department of Labor. The record, however, contains no support for that assertion.

The petitioner is obliged to demonstrate that the substituted petitioner is the true successor, within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981), of the prospective employer named on the approved Form ETA 750. The substituted employer must submit proof of the change in ownership and of

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<sup>4</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer.<sup>5</sup>

The Service Center did not request any evidence pertinent to those issues, and counsel provided none. Because counsel was not required to provide any such evidence, that issue plays no part in today's decision. This office notes, however, that in any further proceedings, either a motion or a new petition based on the same Form ETA 750, the petitioner should be required to provide evidence pertinent to those issues.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

**ORDER:** The motion is granted. The AAO's decision of October 2, 2003 is affirmed. The petition is denied.

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<sup>5</sup> In addition, consistent with the decision in *Matter of Dial Auto Repair Shop, supra*, the substituted employer must show that from the priority date to the date the business was transferred, the original prospective employer had the ability to pay the proffered wage, and that the substituted petitioner had the ability to pay the proffered wage beginning when the business was transferred. As is detailed above, the petitioner has not demonstrated either that the original prospective employer or the substituted petitioner had the ability to pay the proffered wage during any of the salient years.